No. 15,594

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON MAYER,

Appellant,

vs.

ERNEST WRIGHT, Regional Commissioner of Internal Revenue Service and HAROLD HAWKINS, District Director, Internal Revenue Service,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Louis E. Goodman, Trial Judge.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Plaintiff's argument reduced to its simplest terms is set forth on pages 17 and 18 of his Opening Brief thus: he, because of religious training and belief, is conscientiously opposed to war or to military preparation for war. He accepts the Sixth Commandment as an unconditional and unchangeable commandment against killing. He would not kill another human being himself, and would not put the instruments of

killing into the hands of others who would or could do the killing for him vicariously. He cannot pay for instruments of destruction and killing because doing so would be contrary to his religious belief which is protected by the First Amendment.

The Government's argument similarly reduced to its simplest terms is this:

(1) Plaintiff disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens and because of such disapproval he ought not to be compelled to pay the taxes disapproved of by him. (App. Brief, page 7.)

(2) He asks relief from the payment of such part of his taxes which are expended for war purposes, even though he does not show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the tax collection. (App. Brief, page 9.)

(3) Plaintiff's showing as to the injury to him is far too speculative and remote for the courts to afford him relief from the contested tax payment. (App. Brief, page 15.)

(4) That if this plaintiff can contest the use of his taxes, then everyone may do so. (App. Brief, pages 22, 26, 27 and 29.)

(5) That plaintiff's objection to the use of part of his income tax for war preparation is an individual view not supported by any religious organization.

(6) That plaintiff failed to demand refund for his taxes and thus his complaint fails to show a cause of action.

None of these arguments of the Government withstands examination.

I.

THE POSITION OF PLAINTIFF AS TO THE PAYMENT OF TAXES.

The Government, on page 7, wrongly states that the gist of plaintiff's position is "that he disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens, and, accordingly, he should not be compelled to pay that portion of his taxes which is utilized for purposes of which he disapproves." Using the word "disapproves" in the above sentence twice, the Government attempts to reduce plaintiff's conscientious position to a personal and even to a quixotic one. Plaintiff's Opening Brief, setting forth his position arrived at after long soul-searching, makes it clear that the Government did not set forth the gist of his position, rather deliberately misconstrued it.

As it is set forth in the Appellant's Brief (pages 15 to 18) he is a religious objector to war and to any form of preparation for it, and his objection is of long standing. His public statements as to his Pacifist position is accepted as that of the Quakers on whose behalf he was lecturing on the subject of Pacifism. While still of draft age, plaintiff informed his draft board that because of his religious training and belief emanating from his belief in the Supreme Being, he was opposed to participation in the war in any form

and that, therefore, he could not perform military service, either as a combatant or as a non-combatant.

After reaching the age that exempted him from draft, and after long meditation, he concluded that contributing to the purchase of armaments by paying those parts of his taxes that are used for such purposes is contrary to his conscientious objection to war and preparation therefor, and he informed the tax collector. Plaintiff claimed in his correspondence with the Treasury Department that since Congress in deference to the First Amendment granted exemption to conscientious objectors from military service who were of draft age, that he ought to be given a similar exemption by not being compelled to contribute to the war preparation in the form of tax payment. Plaintiff is not objecting to the payment of taxes; in fact, he asked the Government that he might be allowed to pay the full amount of his taxes for non-military purposes, because he was unable as a sincere religious objector to war to pay taxes for purposes of war preparation.

Looking upon the situation in this manner, the plaintiff's position is seen to be neither personal nor quixotic as the Government's brief attempted to make it.

II.

PLAINTIFF'S RELIGIOUS OBJECTION TO WAR WAS MAINTAINED IN THE PAST AND IT IS MAINTAINED AT THE PRESENT.

On page 9 of the Government's Brief, it argues that plaintiff cannot obtain any relief on the payment of those parts of his taxes that are used for war purposes because he sustains no direct injury as the result of the tax collection, and that if he suffers injury that it is indefinite or is in common with people generally.

Our Opening Brief makes it clear that the Government again misconstrued plaintiff's position, because one thing stands out in bold relief and that is, that plaintiff is a conscientious objector *now*. Plaintiff is conscientiously unable to participate in war either by means of direct participation in the killing entailed by all wars, or by contributing his earthly goods to purchase implements of warfare. The forcible collection of those parts of his taxes that are used for war preparation are injuring him as a conscientious objector *now*. The compulsion *now* placed upon him is interfering with the free exercise of his religion *now*.

Plaintiff's injury is not in common with people generally. Those who are not opposing war because of religious training and belief have not, and cannot have, any objection to the purchase of armaments to be used for war purposes of which they approve.

As the Appellant's Brief shows (page 6), the plaintiff offered the payment of his taxes in full and asked that one-half (½) thereof now budgeted and expended for war purposes "be placed in the general funds of

the Treasury of the United States to be expended solely for peaceful and constructive purposes." The Government then goes on to argue (pages 9 and 10) against this proposition, indicating, though not stating, that such earmarking of plaintiff's taxes would be contrary to the law or the Constitution. The Government is in error on that score, because it was held that the appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other Constitutional provision is violated. So it was held in the *Cincinnati Soap Co. v. United States,* 301 U.S. 308 (1937), wherein a processing tax on cocoanut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.

Similarly, the court upheld the excise tax on employers which tax was intended to provide funds for payments to retired workers. *Halvering v. Davis,* 301 U.S. 619 (1937). The court in the above cases upheld the use of taxes for specific purposes under the general welfare clause of the Constitution. The same clause is eminently applicable to plaintiff's request for relief when he asked that part of his taxes which otherwise would be expended for destructive purposes "be expended solely for peaceful and constructive purposes."

The earmarking of taxes is a procedure resorted to from time to time as it is contemplated in connection with the financing of the expanded expenditures of the Civil Aeronautics Administration. The Executive

Department of the United States undertaking a high priority study as to the method of taxation for the purposes of the C.A.A. "One financing device under consideration is a special trust fund, separate from the Federal budget, like the one set up for Federal highway construction last year. That way airlines and others would have a guarantee their tax payments were going directly into traffic control gear and not, say, into slum clearance.'"[1]

The plaintiff, in the instant case, suggests that those parts of his taxes which would otherwise be spent for armament purposes be set aside and used, let us say, for existing Federal programs of public health or slum clearance purposes, which purpose under the various decisions is to be considered to be covered by "the general welfare" clause of the Constitution.

III.

THE USE OF PLAINTIFF'S TAX MONEY FOR THE PURCHASE OF IMPLEMENTS OF WAR IS A POSITIVE INJURY TO HIM AT THE PRESENT BECAUSE IT INFRINGES UPON THE FREE EXERCISE OF HIS RELIGION.

Appellant's Brief, page 15, maintains that plaintiff's claim based on some future raise of the draft age which would subject him to the draft into the Armed Forces is far too speculative and remote. That is, we submit, not well taken. Our Opening Brief, pages 36 to 43, answered the Government's contention.

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[1]Edmund K. Faltenmayer in the Wall Street Journal, Vol. 56, No. 29, February 11, 1957.

We want to add just one point which will indicate the error of the Government's contention.

It cannot be gainsaid that Congress has the power to raise the draft age. Plaintiff is not so ancient, nor is the peace situation of the world so stable that war is totally excluded in his lifetime. If war should break out, it is expected to be of extreme ferocity requiring substantially all able-bodied men and possibly women to serve in the Armed Forces. It is then to be expected that the draft age will be raised to include the plaintiff. If that comes to pass his present contribution of his taxes for the purchase of implements of war will, at best, cast doubt upon his sincerity as a conscientious objector, or, at worst, will justify the draft boards in denying him the classification of a religious objector. See *Perry Bowen Moore v. United States*, 217 F. 2d 428, 348 U.S. 966, and *Witmer v. United States*, 75 Sup. Ct. 392.

IV.

THE GOVERNMENT'S ARGUMENT, PAGES 22, 26, 27 AND 29, THAT IF ONE TAXPAYER MAY CONTEST THE USE OF HIS TAXES, SO CAN ANOTHER ONE, FAILS TO CONSIDER CERTAIN CRUCIAL DISTINCTIONS.

One distinction is that plaintiff stands foursquare on the First Amendment which grants to him, without any negative power on the part of Congress, the free exercise of his religion. A further distinction is that plaintiff is admittedly a Pacifist who, because of his

religious training and belief, is conscientiously opposed to participate in war or in preparation therefor in any form, and thirdly, that Congress, undoubtedly in deference to the First Amendment, legislated that conscientious objectors, if proven to be such, are not to be compelled to participate in war in any form.

This last distinction should suffice as an answer as to why the practice of polygamy was never considered by our courts as falling within the free exercise of religion. Polygamy was never given by Congress the status as that given to conscientious objectors and, in consequence, the Government's argument based on the case of *Mormon Church v. United States,* 136 U.S. 1, is without any binding effect on the issues here.

V.

PLAINTIFF'S OBJECTION TO THE USE OF PART OF HIS INCOME TAXES FOR WAR PREPARATION IS IN LINE WITH THE RELIGIOUS VIEWS OF THE QUAKERS. FURTHERMORE, THE QUESTION OF CONSCIENCE IS THAT OF THE INDIVIDUAL AND NOT OF ANY GROUP.

The Government in its footnote 4 on page 25, questions whether plaintiff's objection to the use of part of his taxes for war purposes represents an individual view or the belief of a religious body. It is wholly immaterial to the issues here. Congress in granting the right to conscientious objectors to be exempted from military service speaks of the **individual conscience.** Title 50, App. U.S. Code 451, *et seq.* (Section

456j) speaks of a "**person**" who "by reason of religious training and belief is conscientiously opposed to participation to war in any form." In defining religious training and belief, the Act says that it "means an **individual's belief** in a relation to a Supreme Being involving duties superior to those arising from any human relationship . . ." The Statute further states that the application is to the individual because "any **person** claiming exemption . . ." (Emphasis added.)

The Government's argument on this score is wholly in error because the Religious Society of Friends (Quakers) subscribes to the position herein taken by plaintiff who is a participant in the activities of the Friends Meetings, and leading Quakers of the country recognize plaintiff's lectures, articles, etc. as expressing the Quaker's Pacifist position (Tr. 6, Opening Brief, pages 3 and 4). Let us see what the Quakers profess with reference to the issues here involved. A Meeting representing Friends in the United States held at Earlham College, Richmond, Indiana, July 20 to 22, 1948, issued a statement entitled "Advices on Conscription and War." Therein it is stated "a living concern having been expressed that Friends' practices be consistent with their professions, Friends are urged . . . to consider carefully the implication of paying those taxes, a major portion of which goes for military purposes." The "Peace Testimony of the Society of Friends" issued by the American Friends Service Committee records that in 1755 a considerable number of Friends refused to pay a tax levied in

Pennsylvania largely for the purpose of waging the Indian Wars.

The Revolutionary War of this country confronted the Quakers with momentous problems when they were called upon to choose between their secular duty to pay taxes for war purposes and their duty imposed upon them by their religious conviction. Job Scott describes the Friends' position taken in 1779 as follows: "At our early Meeting this year, 1779, the subject of Friends paying taxes for war came under solid consideration. Friends were unanimous that the testimony of truth and of our Society was clearly against our paying such taxes as were wholly for war and many solid Friends manifested a lively testimony against the payment of those in the mixture; which testimony appeared evidently to me to be on substantial ground, arising and spreading in the authority of truth."

It was almost 300 years ago when the Quakers under the leadership of George Fox presented their Declaration to Charles II, which Declaration is still adhered to by the Quakers at this time: "We utterly deny all outward wars and strife, and fightings with outward weapons, for any end, or under any pretence whatever; this is our testimony to the whole world. The Spirit of Christ by which we are guided, is not changeable, so as once to command us from a thing as evil, and again to move us unto it; and we certainly know, and testify to the world, that the Spirit of Christ, which leads us unto all truth, will never move us to fight and war against any man with outward

weapons, neither for the Kingdom of Christ, or for the kingdoms of this world . . . Therefore we cannot learn war any more."

VI.

UNDER THE ALLEGATIONS OF THE COMPLAINT, THE REFUND FOR TAXES WAS USELESS AND, THEREFORE, IT WAS NOT REQUIRED TO BE MADE.

From January 1953 until August 15, 1954, plaintiff wrote numerous letters to the Treasury Department setting forth his position as to his inability as a conscientious objector to pay those parts of his taxes which are used for war purposes. (Tr. 8, 9, 10, 11, 12, 13, 14, and 15.) (Exhibits E, F, G, and H.)

He expended a great deal of time in his efforts to obtain relief from the Administrative Agency, but he was not successful, because the Treasury Department answered him on September 2, 1954 that while it ". . . appreciates the sincerity of your views in this matter, the Federal Income Laws . . . apply uniformly to every individual . . ." (Tr. 15.) From the record it is apparent that the road to a refund was barred to him, and under the decision of *Allen v. Regents,* 304 U.S. 430, the circumstances are such that no refund request was to be made since it would have represented nothing but useless effort with no expectation that he will accomplish what his correspondence of a year and a half failed to do.

It requires no citation of cases to prove that the elementary principium that the law does not require

one to do a useless thing is applicable here. Since the law does not so require plaintiff to proceed, it is submitted that equity will give him the same consideration.

Plaintiff further submits that his complaint stated a cause of action with the refund demand because of the common law right that was upheld in *Sirian Lamp Co. v. Manning*, 123 F. 2d 776, 138 A.L.R. 1423.

In the *Sirian Lamp Co.* case it was held that the taxpayer's right to sue the collector for refund for taxes illegally assessed or collected, is a common law right against the collector personally, and is not derived from Section 3772 of the Internal Revenue Code of 1954. That Section merely requires a preliminary appeal to the commissioner as a condition precedent to the enforcement to his common law liability.

In the instant case, plaintiff made more than one appeal to the commissioner, all of which were unsuccessful and, therefore, the condition precedent was complied with and he may proceed in reliance on the court's equity jurisdiction.

Section 3772 makes it obvious that the purpose is to afford the Treasury Department an opportunity to consider the taxpayer's claim and make a refund or provide for an administrative settlement before resorting to the courts. Plaintiff afforded many an opportunity to the Treasury Department, since he asked the commissioner repeatedly not to proceed forcibly to collect the taxes involved. The giving of such opportunity to correct the error is the sole purpose of

the refund Section 3772. See *Murphy v. United States,* 78 F. Supp. 236; *Carmack v. Scofield,* 201 Fed. 2d 360; *Reeves v. Wise,* 119 Fed. 2d 472, cert. den. 62 S.Ct. 181; *Hanna Iron Ore v. United States,* 68 F. Supp. 832.

CONCLUSION.

The order of the Trial Court of March 18, 1957, as we have shown in our Opening Brief and as we have shown in the present Reply Brief, is contrary to the Constitutional concept involved in the issues here and, therefore, it was entered in error. The order of March 18, 1957 ought to be reversed by this Honorable Court.

Dated, Carmel, California,
November 7, 1957.

Respectfully submitted,
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